87 - 1223

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

GER-SHEP, INC., KLP, INC., THEODORE W. SCHELL, MCMINN'S ASPHALT CO., INC., MCMINN'S ASPHALT PRODUCTS, INC. and JEFFREY G. SWEIGART,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION
For A Writ Of Certiorari
To The United States Court of Appeals
For The Third Circuit

RICHARD A. SPRAGUE
Counsel of Record for Petitioners
Ger-Shep, Inc., KLP, Inc. and
Theodore W. Schell

SPRAGUE, HIGGINS & CREAMER
Suite 400, Wellington Building
135 South 19th Street
Philadelphia, PA. 19103
(215) 561-7681

and

WILLIAM A. DeSTEFANO
Counsel of Record for Petitioners
McMinn's Asphalt Co., Inc.,
McMinn's Asphalt Products, Inc.
and Jeffrey G. Sweigart

DeSTEFANO & GUERNSEY
The Drexel Building
1435 Walnut Street
Philadelphia, PA. 19102
(215) 864-0808

Of Counsel:
PAMELA W. HIGGINS
PHILIP I. WEINBERG

SPRAGUE, HIGGINS & CREAMER
Suite 400, Wellington Bldg.
135 South 19th Street
Philadelphia, PA. 19103

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

Questions Presented For Review

1. Should not a writ of certiorari issue to review judgments by the Court of Appeals for the Third Circuit affirming convictions in a criminal antitrust case in which the jury was improperly instructed that the government did not have to prove any nexus between a wholly intrastate activity and interstate commerce, thus removing an essential element of the case from the jury's consideration?

2. Should not a writ of certiorari issue to review judgments by the Court of Appeals for the Third Circuit affirming convictions in a criminal antitrust case upon evidence which is equally consistent with lawful activity and which would not have survived a motion for summary judgment against a plaintiff in a civil action under the same statute?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—*(Continued)*

Parties Below

Pursuant to Supreme Court Rule 19.4, all codefendants at trial and on appeal below join in this Petition. Following the conviction of defendants, their appeals were consolidated before the Court of Appeals for the Third Circuit which affirmed the conviction of appellants by judgment order. A joint petition for rehearing on behalf of all was denied.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

GER-SHEP, INC., KLP, INC., THEODORE W. SCHELL, MCMINN'S ASPHALT CO., INC., MCMINN'S ASPHALT PRODUCTS, INC. and JEFFREY G. SWEIGART,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION
For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Ger-Shep, Inc., KLP, Inc., Theodore W. Schell, McMinn's Asphalt Co., Inc., McMinn's Asphalt Products, Inc. and Jeffrey G. Sweigart hereby petition that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review its judgments at Nos. 87-1113, 1114, 1115, 1116, 1117 and 1118.

OPINIONS BELOW

The Court of Appeals affirmed petitioners' convictions by judgment orders entered October 19, 1987, which are reproduced at A-1, *et. seq*. On November 12, 1987, a petition for rehearing was denied; that order is reproduced at A-16.

JURISDICTION

On June 30, 1986, at the conclusion of a lengthy jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioners were convicted on a one-count indictment charging them with violating 15 U.S.C. §1 (The Sherman Act). After sentencing, petitioners' bail was continued pending appeal. On October 19, 1987, a panel of the Court of Appeals for the Third Circuit affirmed the convictions, and rehearing was denied on November 12, 1987. Issuance of the mandate was stayed by order dated November 25, 1987 (A-18) until January 11, 1988.

This Court's certiorari jurisdiction is established by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION

The issues presented call upon this Court to construe and apply the Fifth Amendment to the Constitution of the United States which provides in pertinent part:

> "No person shall be . . . deprived of life, liberty or property, without due process of law. . . ."

STATEMENT OF THE CASE

Petitioners are hot-mix asphalt producers who were charged with violating Section 1 of the Sherman Act (15 U.S.C. §1) by engaging in a conspiracy in unreasonable restraint of interstate commerce. The prosecution contended that the defendants agreed at annual meetings between 1978 and 1982 to allocate territories, fix prices and submit collusive bids to purchasers in Lancaster County, Pennsylvania. The defendants conceded that such meetings took place and that many industry topics were discussed, including costs, prices and competition. The defendants denied, however, that they agreed at these meetings or elsewhere to fix prices, allocate customers or rig bids.

Facts Relevant to the Interstate Commerce Issue

The indictment alleged and the government contended at trial that the complained of activities were *both* "in the flow of" interstate commerce (interstate) and "substantially affected" interstate commerce (intrastate). The interstate commerce aspects of the case were hotly contested at trial. There was no evidence whatsoever to support the "flow of commerce" (interstate) theory; the only possible prosecution theory capable of supporting a conviction was the "substantial effect" (intrastate) theory. Even though the defendants contended there was insufficient evidence from which the jury could have found a substantial adverse effect on interstate commerce, the trial judge's erroneous instruction improperly foreclosed jury consideration of that issue and impermissibly lessened the prosecution's burden of proving each element of the offense beyond a reasonable doubt.

After deliberating for several hours, the jurors requested "clarification of the two points of violating the interstate commerce law — interstate commerce and effect." (A-19) In response to that request, the jurors

were erroneously advised that "the government is not required to prove any adverse impact on interstate commerce" under either theory. (A-20) The trial judge should have charged the jurors that they first must find that the intrastate activity had a substantial impact upon interstate commerce. Only then could they consider whether or not the complained of intrastate activities had a "not insubstantial" adverse impact upon interstate commerce. Under the instruction given, all interstate commerce aspects of the case were removed from the jury's consideration, and the prosecution was not required to prove those essential elements of the crime charged beyond a reasonable doubt. Such serious error mandates that the convictions be set aside and a new trial ordered.

Facts Relevant to Proof of the Sherman Act Criminal Charge

The evidence presented by the government in this criminal case was equally consistent with lawful conduct and would have been insufficient to enable a civil plaintiff in an action under the same statute to withstand a motion for a summary judgment.

It was undisputed at trial that petitioners and other competitors met annually to discuss their common business interests and economic conditions and to exchange market information among themselves. The government contended and petitioners disputed that such meetings resulted in or constituted agreements to fix prices, allocate customers and/or rig bids. Two persons who attended some of those meetings were called as immunized witnesses at trial by the government. One of those witnesses, who attended only the last two of the four meetings, offered little more than his opinion that an accommodation among asphalt producers had been achieved at some time prior to his attendance. The remaining witness testified in such an inconsistent,

self-contradictory fashion that the government was permitted to treat him as a hostile witness on redirect examination. Faced with the prospect that this testimony would be insufficient to convict the defendants, the government resorted to circumstantial evidence in an attempt to support its claim of unlawful conspiracy. For example, the prosecution offered color-coded maps showing that certain asphalt producers usually were the successful bidders in certain townships during each of the four years of the alleged conspiracy. This was also the case, however, during many of the years prior and subsequent to the alleged conspiracy -- periods when, according to the government, there was vigorous competition. Moreover, there was undisputed testimony that hot-mix asphalt could not be economically delivered more than 10 or 15 miles from its production facility; this geographic constraint is attributable to high transportation costs as well as the fact that the asphalt must be laid at a temperature of no less than 175 degrees Fahrenheit, only about 25 degrees cooler than the temperature at which it leaves the plant. Thus, the fact that a particular producer was the successful bidder in a particular municipality for a number of years is not dispositive of criminal conduct; rather it is equally consistent with the economic realities of the asphalt industry.

The government also offered evidence that during the four years of the alleged conspiracy, prices for hot-mix asphalt were between 6 and 10 percent higher in Lancaster County than prices for the same product in the five surrounding counties. However, the defense offered expert testimony establishing that, absent consideration of a myriad of cost factors, no legitimate inference could be drawn from such a price differential. Nonetheless, no attempt was made by the government to account for any other reason why such prices tended to be higher or to determine whether the same was true in the years before or after the alleged conspiracy. The

expert testimony went unrebutted. The jury was asked by the government and permitted by the trial judge to infer that an unlawful conspiracy existed simply from the fact that prices were higher.

One piece of circumstantial evidence upon which the government relied as though it were a "smoking gun" was a typewritten list of townships and boroughs in Lancaster County to which handwritten initials had been added. Although this Court is not being asked to consider the issue of whether the list should have been admitted in evidence, the fact that it was clearly *inadmissible* cannot be disregarded in the context of the issues raised by this Petition. The initials on the list apparently represented Lancaster County asphalt producers and were in the handwriting of a producer who was deceased at the time of trial and, thus, unable to explain the meaning of his notations. Despite the fact that there was no evidence as to when or why the list was made or why the initials had been placed beside the municipalities, the trial judge admitted the list as a co-conspirator statement.[1] Consequently, the prosecution was allowed to argue that the list was made to record the results of a market allocation agreement. The list could just as easily have been made independently and for legitimate business reasons, such as to record which company had been the successful bidder in a particular municipality in any given year, or to denote which municipality contained or was closest to a production facility operated by one of the competitors. It is significant that the name of a borough appeared on the list, which borough had gone out of existence in 1970,

---

1. The trial court, perhaps recognizing that the requisites for admission of the list as a co-conspirator statement were not shown by the government, later *sua sponte* mischaracterized the list as a business record in an attempt to justify its admission.

eight years prior to the beginning of the alleged conspiracy. Nevertheless, the jury was urged by the government and permitted by the trial judge to infer that an unlawful conspiracy existed simply because one of the alleged conspirators maintained such a list.

Moreover, petitioners presented the expert testimony of a professor from the University of Pennsylvania's Wharton School who performed a time series regression analysis of the defendants' bidding and pricing practices in years prior, during and subsequent to the alleged conspiracy. This computer study demonstrated that the pricing behavior of the defendants during the period of the alleged conspiracy was identical to their pricing behavior during several years when the government conceded there was no conspiracy at all. Thus, the expert economist testified that she could find no evidence of any action or behavior by the defendants which had the effect of raising, fixing, stabilizing or maintaining prices during the years in question. Significantly, although one of the Justice Department Antitrust Division's staff economists was present during the defense economist's testimony and met with her for several hours after her testimony to ascertain the validity of her study, no rebuttal testimony was offered by the government to dispute her economic findings or expert opinion.

Because the evidence established only that defendants met and engaged in activity equally consistent with lawful behavior, it is clear that the proven facts would have been insufficient in a civil action under the Sherman Act to withstand a motion for summary judgment. Nevertheless, the trial judge not only permitted this criminal case to go to the jury but erroneously instructed that jury, further reducing the government's burden of proof.

ARGUMENT

Reasons For Granting The Writ

The instruction given by the district court conflicts with the law as enunciated by Courts of Appeals in the Seventh, Eighth and Ninth Circuits. By affirming the district court's judgment, the Court of Appeals for the Third Circuit created a conflict in the law as applied among the circuits. That conflict should be resolved by this Court.

Additionally, petitioners were convicted of criminal violations of the Sherman Act upon evidence which would not have withstood a summary judgment motion in a civil action under the same statute. The criminal convictions were based upon evidence which was equally probative of lawful business conduct. This case presents an opportunity for this Court to resolve the conflict which exists wherein the government, in a criminal proceeding under the Sherman Act, has a lesser burden of proof than a plaintiff in a civil action under the same statute in view of *Monsanto v. Spray Rite Service Corporation*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984) and *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, ____ U.S. ____, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

I. The Prosecution's Burden Of Proof In This Criminal Antitrust Case Was Impermissibly Reduced.

A. *There Can Be No* Per Se *Violation Of The Sherman Act In An Intrastate or "Effect On Commerce" Case.*

The Sherman Act (15 U.S.C. §1) extends to transactions in the stream or flow of interstate commerce and to transactions which are intrastate but which substantially affect interstate commerce. The Court of Appeals for the Third Circuit has clearly enunciated the different elements which must be proved under each theory. An

"in commerce" theory requires the government to prove that: (1) a substantial volume of interstate commerce is involved with the challenged activity, and (2) the challenged activity is an essential, integral part of the transaction and is inseparable from its interstate aspects. An "effect on commerce" theory applies to activity which is primarily intrastate. The government must show that: (1) a substantial amount of interstate commerce was involved, and (2) the challenged activity has a "not insubstantial effect" on interstate commerce. *United States v. Fischbach and Moore, Inc.*, 750 F.2d 1183, 1192 (3d Cir. 1984).

Since the Sherman Act prohibits only *unreasonable* restraints on interstate commerce, certain kinds of activities have been deemed unreasonable *per se*. Price fixing and bid rigging are deemed *per se* violations and no further unreasonable restraint or adverse impact on interstate commerce need be shown. *Id.* That presumption applies only in "flow of commerce" cases, however, since the jurisdictional predicate of interstate commerce has otherwise been demonstrated. The presumption does not apply in intrastate or "effect on commerce" cases. *United States v. Ben M. Hogan Co., Inc.*, 809 F.2d 480, 481 (8th Cir. 1987) ("Although the per se instruction created a conclusive presumption that interstate commerce was affected, the jury could not even consider the per se instruction unless it had first found that interstate commerce had been affected."); *United States v. Bensinger Company*, 430 F.2d 584, 588-89, n.3 (8th Cir. 1970). ("Were the price-fixing to have occurred in intrastate commerce, it would be necessary to show a substantial impact upon interstate commerce."); *see also United States v. Starlite Drive-in, Inc.*, 204 F.2d 419, 422 (7th Cir. 1953) ("Neither this case nor any other, however, supports the theory advanced here that local activities are illegal simply because they concern articles which have previously moved in interstate commerce. Nor do they hold that a price-fixing agreement between

local retailers dealing in a product produced in another state is illegal in the absence of a specific showing of the effect of the conspiracy on interstate commerce."); *Las Vegas Merchant Plumbers Association v. United States*, 210 F.2d 732, 746 (9th Cir. 1954) ("This [*per se*] instruction fitted into the plan of instruction of the 'in commerce' theory. But because it stated that price fixing necessarily affected commerce it did not leave to the jury the factual question of the impact of wholly intrastate activities on interstate commerce and hence is not available as presenting the 'affect commerce' theory."). *Accord Washington State Bowling Proprietors Association, Inc. v. Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir. 1966).

The law as set forth in the foregoing decisions was not applied at petitioners' trial. The "effect on commerce" or intrastate theory relied on by the government required the trial judge to instruct the jurors that they must decide two issues: (1) whether the intrastate activity involved a substantial amount of interstate commerce; *and* (2) whether the challenged intrastate activity had a "not insubstantial effect" on interstate commerce. However, the jurors were not permitted to make those required determinations. Instead, they were erroneously instructed that the government was not required to prove *any* adverse impact on interstate commerce. Predictably, convictions resulted.

B. *Petitioners Were Convicted Without Proof Beyond A Reasonable Doubt Of Each Element Of The Offense.*

In this case, the government's burden was impermissibly lessened and the jurors were permitted to convict appellants without even considering the necessary element of whether or not the intrastate activity had a substantial impact on interstate commerce. Needless to say, the trial judge's instruction to the jurors in this complicated criminal antitrust conspiracy case were

predictably lengthy and complex. After deliberating for some time, the jurors sent a note to the court requesting "clarification on the two points of violating the interstate commerce law, interstate commerce and effect." (A-19) The fact that the lay jurors recognized that two aspects of interstate commerce were involved demonstrates their awareness of the substantial evidentiary issues in the case and their confusion as to the law to be applied.

Over objection, the trial judge instructed the perplexed jurors as follows:

> An in-commerce theory requires that the government prove that, one, a substantial volume of interstate commerce is involved with the challenged activity, and, two, the challenged activity is an essential integral part of the transaction. It is inseparable from its interstate aspects. An effect on commerce theory applies to primarily intrastate activity. The government must show that, one, a substantial amount of interstate commerce was involved and, two, the challenged activity has a substantial effect on interstate activity.
>
> The government may prove the connection between interstate commerce and the challenged activity through either the activities of the target of the anti-trust violation or defendant's activities.
>
> **Because the challenged activities in this case are alleged price-fixing, bid-rigging and allocation of territories, which are by themselves determined to be unreasonable violations of the Sherman Act, if, in fact, that was what the defendants did, the government is not required to prove any adverse impact on interstate commerce.**

(A-20) (Emphasis supplied.)

This *per se* instruction must have been understood by the jury to relieve the government, *under either theory,* of any burden of proving an adverse or substantial impact on interstate commerce. The jurors were thus permitted to apply an unconstitutional, conclusive presumption of an effect on interstate commerce. Even though the court's earlier, complete instruction had been correct, the supplemental instruction, fresh in the jurors' minds, was erroneous and irreconcilably contradictory. "A reviewing court has no way of knowing which of two irreconcilable instructions the jurors applied in reaching [a] verdict." *Francis v. Franklin,* 471 U.S. 307, 105 S.Ct. 1965, 1975, 85 L.Ed.2d 344 (1985).

Petitioners were denied the opportunity to have their defense considered by a properly instructed jury. Throughout the lengthy trial, the defendants had contended that there was no substantial effect on interstate commerce and that interstate commerce was not involved. The jurors' question evidenced their deep concern with this aspect of the case. "A defendant is always entitled to have his theory of the case, if it could amount to a lawful defense, fairly submitted to the consideration of the jury." *United States v. Flom,* 558 F.2d 1129, 1185 (5th Cir. 1977). Petitioners were denied that right when the jury was improperly instructed that the government did not have to prove any adverse impact on interstate commerce.

In this case, petitioners were convicted of federal criminal charges and sentenced to terms of imprisonment and fined up to $300,000 without any finding by the jury that the challenged activity had any adverse impact or substantial effect on interstate commerce whatsoever. The jury's request for further instruction and "clarification of the two points of violating the interstate commerce law — interstate commerce and effect" conclusively proves the jurors' concern and indecision in this area. Yet, they were erroneously advised that "the government is not required to prove any

adverse impact on interstate commerce" under either theory. The trial judge should have instructed the jurors that they first must find that a substantial amount of interstate commerce was involved. Only then could they consider whether or not the complained of activities had a "not insubstantial" adverse impact upon interstate commerce. Under the instruction given, the issue of whether the government had proved both of the interstate commerce elements of the case was removed from the jury's consideration altogether. This serious error mandates that the convictions be set aside and a new trial ordered. This Court should grant the petition and issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

II. The Prosecution In This Criminal Antitrust Case Enjoyed A Lesser Burden Of Proof Than A Plaintiff In A Civil Action Under The Same Statute.

This Court has not reviewed a criminal conviction under Section 1 of the Sherman Act since its 1978 decision in *United States v. United States Gypsum Co.*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978). In *Gypsum*, this Court expressed concern that both civil and criminal liability was imposed by the same generalized definition of proscribed conduct under the Sherman Act. 438 U.S. at 438-39. This Court also noted that since the exchange of price data and other information among competitors does not invariably have anticompetitive effects, such exchanges of information do not constitute a *per se* violation of the Sherman Act. 438 U.S. at 440, n.16. As *Gypsum* clearly articulates, the proposition that activity falling within the "gray zone of socially acceptable and economically justifiable" business conduct is not *per se* violative of the Sherman Act. Therefore, just as the trial court's erroneous charge foreclosed consideration of the interstate commerce question, it similarly lessened the government's burden of proof when faced with clear evidence of arguably lawful conduct. The

clear effect of the erroneous instruction was to insure a conviction without regard to any effect on interstate commerce and without regard to the legality of the complained of activity.

Since its decision in *Gypsum* nearly ten years ago, this Court has reviewed several civil cases arising under the Sherman Act, including *Monsanto v. Spray Rite Service Corporation*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984) and *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, ____ U.S. ____, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). These decisions are widely regarded as substantially increasing the civil plaintiff's burden of proof in establishing a violation of the Sherman Act. Evidence tending to exclude the possibility that the alleged antitrust conspirators acted independently is required by *Monsanto* in civil cases. *Monsanto* also embraced the economic principle that discussion between competitors was not itself probative of unlawful conduct even when followed by conduct further suggesting that an agreement in restraint of trade had been reached by the parties (the termination of a price-cutting distributor). Similarly, evidence showing that an inference of an antitrust conspiracy is reasonable in light of competing inferences of independent action by the competitors was required by *Matsushita*. 106 S.Ct. at 1354. Moreover, the *Matsushita* Court sanctioned the use of summary judgment to dispose of civil claims of unlawful conduct which are equally explained by the economic realities of the marketplace or which are not supported by persuasive evidence.

This case presents an opportunity to review a criminal conviction under the Sherman Act upon evidence which would have been insufficient to allow a civil plaintiff to withstand summary judgment under *Monsanto* and *Matsushita*. Like *Gypsum*, this case involves discussion and exchanges of information among competitors. The defendants admitted that such discussions

took place but maintained that they never *agreed* to any plan or program to fix prices, allocate customers or rig bids. In support of their defense, petitioners offered expert testimony demonstrating that the pricing behavior of the defendants during the period of the alleged conspiracy was identical to their pricing behavior during several years when the government conceded there was no conspiracy at all. No rebuttal testimony was offered by the government to dispute these economic findings or the expert opinion.

Instead, the government relied largely upon circumstantial evidence to support its claim of unlawful conspiracy. (*See* Statement of the Case, *supra*, pp. 4-7.) This circumstantial evidence, however, was equally consistent with lawful economic behavior. For example, the information compiled in the form of color-coded maps was equally consistent with the economic realities of the marketplace as it was with unlawful behavior. The mere fact that prices were higher in Lancaster County than in surrounding counties was fully explainable by a number of economic factors, such as labor costs, production costs, tax rates and numerous other variables which the government did not even attempt to negate. The "dead man's list" of initialed municipalities required speculation to decipher and well could have been created for a legitimate business purpose.[2]

---

2. This evidence was facially unreliable to support the government's argument that the list was a written memorial of an unlawful customer allocation conspiracy beginning in 1978 and ending in 1982. Although the admissibility of this type of evidence has recently been addressed by the Court in *Bourjaily v. United States*, ____U.S. ____, 107 S.Ct. 2775, ____L.Ed.2d ____(1987), we submit that under the particular facts of this case the list raises substantial concerns under the Confrontation Clause even if it had technically qualified as an exception to the hearsay rule, which petitioners contend it did not. *See Lee v. Illinois*, ____U.S. ____, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986).

Petitioners respectfully suggest that none of the circumstantial evidence excludes the possibility that the competitors acted independently, as *Monsanto* requires, or constitutes persuasive evidence of concerted action in light of the economic realities of the marketplace, as required by *Matsushita*. We submit that the Court should review this case in order to determine whether the standard in civil actions under the Sherman Act has become more stringent than that being applied by the courts in criminal cases arising under the same statute. This, of course, would be contrary to fundamental principles of jurisprudence as well as to the concerns expressed by this Court almost ten years ago in *Gypsum*.

Criminal antitrust cases should receive at least the same careful scrutiny by this Court as civil antitrust actions have recently received. The trial judge's mechanistic application of appellate language in this criminal case, without regard for the circumstances or nature of the challenged activity, resulted in a denial of due process to petitioners. The supplemental *per se* instruction not only removed the interstate commerce element from the case, it precluded the application of the "rule of reason" doctrine as required by *Gypsum* and foreclosed an acquittal in the face of evidence equally indicative of lawful business activity. Under this Court's recent guidance in *Monsanto* and *Matsushita*, those results could not have occurred in a civil context. The prosecution in a criminal antitrust action must not be afforded a lesser burden than the plaintiff in a civil action under the same federal statute.

CONCLUSION

Petitioners' convictions were obtained by denying them due process of law. The interstate commerce element was not established, and the government enjoyed a lesser burden as a result of the erroneous jury instruction. Moreover, in this criminal antitrust case, the government's burden of proof was less than that of a plaintiff in a civil action under the same statute. For these reasons, the convictions obtained upon circumstantial evidence equally consistent with innocence should be reversed and a new trial granted.

Respectfully submitted,

RICHARD A. SPRAGUE
Counsel of Record for Petitioners
Ger-Shep, Inc., KLP, Inc. and
Theodore W. Schell

SPRAGUE, HIGGINS & CREAMER
Suite 400, Wellington Building
135 South 19th Street
Philadelphia, PA 19103
(215) 561-7681

and

WILLIAM A. DeSTEFANO
Counsel of Record for Petitioners
McMinn's Asphalt Co., Inc.
McMinn's Asphalt Products, Inc.
and Jeffrey G. Sweigart

DeSTEFANO & GUERNSEY
The Drexel Building
1435 Walnut Street
Philadelphia, PA 19102
(215) 864-0808

Of Counsel:
PAMELA W. HIGGINS
PHILIP I. WEINBERG

SPRAGUE, HIGGINS & CREAMER
Suite 400, Wellington Bldg.
135 South 19th Street
Philadelphia, PA 19103

APPENDIX

APPENDIX

Table of Contents

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1113

UNITED STATES OF AMERICA

v.

GER-SHEP, INC.,

Appellant

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Crim. No. 86-00010-02)
District Judge: Honorable Edward N. Cahn

Argued October 5, 1987

Before: WEIS and STAPLETON, *Circuit Judges*, and COHILL,* *District Judge*.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, to wit:

(1) that there was insufficient evidence upon which a jury could properly have returned verdicts of guilty;

---

* The Honorable Maurice B. Cohill, Jr., United States District Judge for the Western District of Pennsylvania, sitting by designation.

(2) that the government failed to prove beyond a reasonable doubt the existence of a continuing conspiracy;

(3) that the trial court erred in admitting government exhibits 207A and B, as there was no evidence that the statements were made or documents created during the course of the conspiracy;

(4) that the testimony of James Carr was erroneously admitted against Theodore W. Schell;

(5) that because government exhibits 220 through 228 had slight probative value at best, and because they were extremely prejudicial to the defendants, the trial court erred in admitting them;

(6) that the government failed to prove the existence of a single, continuing conspiracy as charged in the indictment, resulting in a variance, prejudicing substantial rights of appellants and requiring reversal;

(7) that government exhibits GX207A and B were improperly admitted into evidence over the objection of counsel for defendant and in violation of Federal Rules of Evidence 403, 801, 803 and the Confrontation Clause of the United States Constitution;

(8) that government exhibits GX-220 — GX-228 were improperly admitted into evidence over the objection of defense counsel and in violation of Rules 403 and 802 of the Federal Rules of Evidence and the Confrontation Clause of the United States Constitution;

(9) that the testimony of government witness James Carr was improperly admitted into evidence over the objection of defense counsel and in violation of Rules 403 and 404 of the Federal Rules of Evidence;

(10) that the defendant was prejudiced by the district court's refusal to instruct the jury in accord with correct statements of the law; it is

ADJUDGED AND ORDERED that the judgment of the district court entered February 26, 1987 be and the same is hereby affirmed.

BY THE COURT,

/s/ WEIS

Circuit Judge

Attest:

/s/ SALLY MRVOS

Clerk

Date: October 19, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1114

UNITED STATES OF AMERICA

v.

KLP, INC.,

Appellant

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Crim. No. 86-00010-03)
District Judge: Honorable Edward N. Cahn

Argued October 5, 1987

Before: WEIS and STAPLETON, *Circuit Judges*, and COHILL,* *District Judge*.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, to wit:

(1) that there was insufficient evidence upon which a jury could properly have returned verdicts of guilty;

---

* The Honorable Maurice B. Cohill, Jr., United States District Judge for the Western District of Pennsylvania, sitting by designation.

(2) that the government failed to prove beyond a reasonable doubt the existence of a continuing conspiracy;

(3) that the trial court erred in admitting government exhibits 207A and B, as there was no evidence that the statements were made or documents created during the course of the conspiracy;

(4) that the testimony of James Carr was erroneously admitted against Theodore W. Schell;

(5) that because government exhibits 220 through 228 had slight probative value at best, and because they were extremely prejudicial to the defendant, the trial court erred in admitting them;

(6) that the government failed to prove the existence of a single, continuing conspiracy as charged in the indictment, resulting in a variance, prejudicing substantial rights of appellants and requiring reversal;

(7) that government exhibit GX207A and B were improperly admitted into evidence over the objection of counsel for defendant and in violation of Federal Rules of Evidence 403, 801, 803 and the Confrontation Clause of the United States Constitution;

(8) that government exhibits GX-220 — GX-228 were improperly admitted into evidence over the objection of defense counsel and in violation of rules 403 and 802 of the Federal Rules of Evidence and the Confrontation Clause of the United States Constitution;

(9) that the testimony of government witness James Carr was improperly admitted into evidence over the objection of defense counsel and in violation of Rules 403 and 404 of the Federal rules of Evidence;

(10) that the defendant was prejudiced by the district court's refusal to instruct the jury in accord with correct statements of law; it is

ADJUDGED AND ORDERED that the judgment of the district court entered February 26, 1987 be and the same is hereby affirmed.

BY THE COURT,

/s/ WEIS

Circuit Judge

Attest:

/s/ SALLY MRVOS

Clerk

Date: October 19, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1115

UNITED STATES OF AMERICA

v.

MCMINN'S ASPHALT CO., INC.,

Appellant

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Crim. No. 86-00010-05)
District Judge: Honorable Edward N. Cahn

Argued October 5, 1987

Before: WEIS and STAPLETON, *Circuit Judges*, and COHILL,* *District Judge*.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, to wit;

> (1) that the government failed to prove the existence of a single, continuing conspiracy as charged in the indictment, resulting in a variance, prejudicing substantial rights of appellants and requiring reversal;

---

* The Honorable Maurice B. Cohill, Jr., United States District Judge for the Western District of Pennsylvania, sitting by designation.

(2) that government exhibits GX207A and B were improperly admitted into evidence over the objection of counsel for defendant and in violation of Federal Rules of Evidence 403, 801, 803 and the Confrontation Clause of the United States Constitution;

(3) that government exhibits GX-220 - GX-228 were improperly admitted into evidence over the objection of defense counsel and in violation of Rules 403 and 802 of the Federal Rules of Evidence and the Confrontation Clause of the United States Constitution;

(4) that the testimony of government witness James Carr was improperly admitted into evidence over the objection of defense counsel and in violation of Rules 403 and 404 of the Federal Rules of Evidence;

(5) that the defendant was prejudiced by the district court's refusal to instruct the jury in accord with correct statements of the law; it is

ADJUDGED AND ORDERED that the judgment of the district court entered February 26, 1987 be and the same is hereby affirmed.

BY THE COURT,

/s/ WEIS

Circuit Judge

Attest:

/s/ SALLY MRVOS

Clerk

Date: October 19, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1116

UNITED STATES OF AMERICA

v.

MCMINN'S ASPHALT PRODUCTS, INC.,
Appellant

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Crim. No. 86-00010-06)
District Judge: Honorable Edward N. Cahn

Argued October 5, 1987

Before: WEIS and STAPLETON, *Circuit Judges*, and COHILL,* *District Judge*.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, to wit:

> (1) that the government failed to prove the existence of a single, continuing conspiracy as charged in the indictment, resulting in a variance, prejudicing substantial rights of appellants and requiring reversal;

---

* The Honorable Maurice B. Cohill, Jr., United States District Judge for the Western District of Pennsylvania, sitting by designation.

(2) that government exhibits GX207A and B were improperly admitted into evidence over the objection of counsel for defendant and in violation of Federal Rules of Evidence 403, 801, 803 and the Confrontation Clause of the United States Constitution;

(3) that government exhibits GX-220 — GX-228 were improperly admitted into evidence over the objection of defense counsel and in violation of Rules 403 and 802 of the Federal Rules of Evidence and the Confrontation Clause of the United States Constitution;

(4) that the testimony of government witness James Carr was improperly admitted into evidence over the objection of defense counsel and in violation of Rules 403 and 404 of the Federal Rules of Evidence;

(5) that the defendant was prejudiced by the district court's refusal to instruct the jury in accord with correct statements of the law; it is

ADJUDGED AND ORDERED that the judgment of the district court entered February 26, 1987 be and the same is hereby affirmed.

BY THE COURT,

/s/ WEIS

Circuit Judge

Attest:

/s/ SALLY MRVOS

Clerk

Date: October 19, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1117

UNITED STATES OF AMERICA

v.

THEODORE W. SCHELL,

Appellant

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Crim. No. 86-00010-07)
District Judge: Honorable Edward N. Cahn

Argued October 5, 1987

Before: WEIS and STAPLETON, *Circuit Judges*, and COHILL,* *District Judge*.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, to wit:

(1) that there was insufficient evidence upon which a jury could properly have returned verdicts of guilty;

---

* The Honorable Maurice B. Cohill, Jr., United States District Judge for the Western District of Pennsylvania, sitting by designation.

(2) that the government failed to prove beyond a reasonable doubt the existence of a continuing conspiracy;

(3) that the trial court erred in admitting government exhibits 207A and B, as there was no evidence that the statements were made or documents created during the course of the conspiracy;

(4) that the testimony of James Carr was erroneously admitted against Theodore W. Schell;

(5) that because government exhibits 220 through 228 had slight probative value at best, and because they were extremely prejudicial to the defendant, the trial court erred in admitting them;

(6) that the government failed to prove the existence of a single, continuing conspiracy as charged in the indictment, resulting in a variance, prejudicing substantial rights of appellants and requiring reversal;

(7) that government exhibit GX207A and B were improperly admitted into evidence over the objection of counsel for defendant and in violation of Federal Rules of Evidence 403, 801, 803 and the Confrontation Clause of the United States Constitution;

(8) that government exhibits GX-220 — GX-228 were improperly admitted into evidence over the objection of defense counsel and in violation of Rules 403 and 802 of the Federal Rules of Evidence and the Confrontation Clause of the United States Constitution;

(9) that the testimony of government witness James Carr was improperly admitted into evidence over the objection of defense counsel and in violation of Rules 403 and 404 of the Federal Rules of Evidence;

(10) that the defendant was prejudiced by the district court's refusal to instruct the jury in accord with correct statements of law; it is

ADJUDGED AND ORDERED that the judgment of the district court entered February 26, 1987 be and the same is hereby affirmed.

BY THE COURT,

/s/ WEIS

Circuit Judge

Attest:

/s/ SALLY MRVOS

Clerk

Date: October 19, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1118

UNITED STATES OF AMERICA

v.

JEFFREY G. SWEIGART,

Appellant

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Crim. No. 86-00010-08)
District Judge: Honorable Edward N. Cahn

Argued October 5, 1987

Before: WEIS and STAPLETON, *Circuit Judges*, and COHILL,* *District Judge.*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, to wit:

> (1) that the government failed to prove the existence of a single, continuing conspiracy as charged in the indictment, resulting in a variance, prejudicing substantial rights of appellants and requiring reversal;

---

* The Honorable Maurice B. Cohill, Jr., United States District Judge for the Western District of Pennsylvania, sitting by designation.

(2) that government exhibits GX207A and B were improperly admitted into evidence over the objection of counsel for defendant and in violation of Federal Rules of Evidence 403, 801, 803 and the Confrontation Clause of the United States Constitution;

(3) that government exhibits GX-220 — GX-228 were improperly admitted into evidence over the objection of defense counsel and in violation of Rules 403 and 802 of the Federal Rules of Evidence and the Confrontation Clause of the United States Constitution;

(4) that the testimony of government witness James Carr was improperly admitted into evidence over the objection of defense counsel and in violation of Rules 403 and 404 of the Federal Rules of Evidence;

(5) that the defendant was prejudiced by the district court's refusal to instruct the jury in accord with correct statements of law; it is

ADJUDGED AND ORDERED that the judgment of the district court entered February 26, 1987 be and the same is hereby affirmed.

BY THE COURT,

/s/ WEIS

Circuit Judge

Attest:

/s/ SALLY MRVOS

Clerk

Date: October 19, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-1113/14/15/16/17/18

UNITED STATES OF AMERICA

v.

GER-SHEP, INC., *et al.*
Ger-Shep, Inc.,
Appellant in No. 87-1113

KLP, Inc.,
Appellant in No. 87-1114

McMinn's Asphalt Co., Inc.,
Appellant in No. 87-1115

McMinn's Asphalt Products, Inc.,
Appellant in No. 87-1116

Theodore W. Schell,
Appellant in No. 87-1117

Jeffrey G. Sweigart,
Appellant in No. 87-1118

(D.C. Crim. No. 86-00010)

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, and HUTCHINSON, *Circuit Judges*, and COHILL,* *District Judge*.

---

* The Honorable Maurice B. Cohill, Jr., Chief Judge of the United States District Court for the Western District of Pennsylvania, who sat by designation, is limited to rehearing before the original panel.

The joint petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the joint petition for rehearing is denied.

BY THE COURT,

/s/ WEIS

Circuit Judge

DATED: November 12, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-1113, 87-1114 & 87-1117

U.S.A. vs. Ger-shep, Inc., Appellant, 87-1113

U.S.A. vs. KLP, Inc., Appellant, 87-1114

U.S.A. vs. Schell, Theodore, Appellant, 87-1117

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until January 11, 1988.

/s/ WEIS

Circuit Judge

DATED: November 25, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-1115, 87-1116 & 87-1118

U.S.A. vs. McMinn's Asphalt Co., Appellant in 87-1115

U.S.A. vs. McMinn's Asphalt Products, Appellant in 87-1116

U.S.A. vs. Sweigart, Jeffrey G., Appellant in 87-1118

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until January 11, 1988.

/s/ WEIS

Circuit Judge

DATED: November 25, 1987

(Excerpt From Trial Transcript of June 25, 1986 at pages 81-82)

THE COURT: We have a question from the jury. Our practice is prescribed by directives from higher courts which instruct us to go over the question with you, suggest input from you as to how to respond to the question, then call the jury in, I'll give them my answer, you'll then have an opportunity to take exceptions to the answer I give and then the jury will be sent back to deliberate.

Does everybody agree to the procedure?

MR. DeSTEFANO: Yes.

MR. PANEK: Fine, Your Honor.

THE COURT: The question is we the jury would like clarification on the two points of violating the interstate commerce law. Interstate commerce and effect.

(Excerpt From Trial Transcript of June 25, 1986 at pages 100-101)

THE COURT: I want to leave them with exactly the right word before I leave the courtroom. I'll stand on my charge.

(End of discussion at side-bar.)

THE COURT: I'm going to read some more law to you on this subject as the last word on it. I'm going to read it slowly and I'm not going to paraphrase it so that you have the exact law on the subject.

An in-commerce theory requires that the government prove that, one, a substantial volume of interstate commerce is involved with the challenged activity, and, two, the challenged activity is an essential integral part of the transaction. It is inseparable from its interstate aspects. An effect on commerce theory applies to primarily intrastate activity. The government must show that, one, a substantial amount of interstate commerce was involved and, two, the challenged activity has a substantial effect on interstate commerce.

The government may prove the connection between interstate commerce and the challenged activity through either the activities of the target of the anti-trust violation or defendant's activities.

Because the challenged activities in this case are alleged price-fixing, bid-rigging and allocation of territories, which are by themselves determined to be unreasonable violations of the Sherman Act, if, in fact, that was what the defendants did, the government is not required to prove any adverse impact on interstate commerce.

You may take the jury back to the deliberation room.

87-1223

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

GER-SHEP, INC., KLP, INC., THEODORE W. SCHELL, MCMINN'S ASPHALT CO., INC., MCMINN'S ASPHALT PRODUCTS, INC. and JEFFREY G. SWEIGART,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL APPENDIX

RICHARD A. SPRAGUE
Counsel of Record for Petitioners
Ger-Shep, Inc., KLP, Inc. and
Theodore W. Schell

SPRAGUE, HIGGINS & CREAMER
Suite 400, Wellington Building
135 South 19th Street
Philadelphia, PA. 19103
(215) 561-7681

and

WILLIAM A. DeSTEFANO
Counsel of Record for Petitioners
McMinn's Asphalt Co., Inc.,
McMinn's Asphalt Products, Inc.
and Jeffrey G. Sweigart

DeSTEFANO & GUERNSEY
The Drexel Building
1435 Walnut Street
Philadelphia, PA. 19102
(215) 864-0808

Of Counsel:
PAMELA W. HIGGINS
PHILIP I. WEINBERG

SPRAGUE, HIGGINS & CREAMER
Suite 400, Wellington Bldg.
135 South 19th Street
Philadelphia, PA. 19103

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

APPENDIX

Table of Contents

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	CRIMINAL NO.
v.	:	86-00010-02
	:	86-00010-03
GER-SHEP, INC., formerly	:	86-00010-05
LANCASTER VALITE, INC.;	:	86-00010-06
KLP, INC., formerly	:	86-00010-07
BITUMINOUS APPLICATORS,	:	86-00010-08
INC.;	:	
McMINN'S ASPHALT CO., INC.	:	
McMINN'S ASPHALT PRODUCTS,	:	
INC.;	:	
THEODORE W. SCHELL; and	:	
JEFFREY G. SWEIGART,	:	
Defendants	:	

OPINION

CAHN, J. December 10, 1986

The defendants[1] were charged in a one count indictment with violating the Sherman Act, 15 U.S.C. §1, (1983), by conspiring between late 1978 and 1982 to fix prices, rig bids, and allocate territories in the bituminous

---

1. The defendant, Theodore W. Schell, an individual, is the principal shareholder of Ger-Shep, Inc., formerly Lancaster Valite, Inc., and KLP, Inc., formerly Bituminous Applicators, Inc. In October of 1981 Lancaster Valite, Inc., and Bituminous Applicators, Inc., sold assets to McMinn's Asphalt Co., Inc. After the sale of these assets, Lancaster Valite, Inc., changed its name to Ger-Shep, Inc., and Bituminous Applicators, Inc., changed its name to KLP, Inc. Mr. Charles McMinn died prior to January 9, 1986, the date when the indictment in this case was returned. The government named Jeffrey G. Sweigart, individually, as a defendant in the indictment alleging that he, as an officer of McMinn's Asphalt Co., Inc., and McMinn's Asphalt Products, Inc., personally participated in the antitrust violations set forth in the indictment.

paving materials business in Lancaster County, Pennsylvania. A jury trial involving these defendants began on June 2, 1986, and on June 27, 1986, the jury found all six defendants guilty. Before the court are the post trial motions of the defendants seeking judgment of acquittal, arrest of judgment or a new trial.

1. FACTUAL CONTEXT

In order to assess the merits of defendants' post trial motions, it is necessary to set forth briefly the factual context of this litigation. In stating this factual context, I will give the government, as the verdict winner, reasonably favorable inferences from the evidence. *Burks v. United States*, 437 U.S. 1, 16 (1978). The alleged conspiracy is geographically limited to Lancaster County and chronologically limited to late 1978 to 1982, inclusive. It involves the manner in which the defendants competed to obtain contracts for bituminous paving materials with municipalities in Lancaster County and with the Department of General Services of the Commonwealth of Pennsylvania (DGS).

The linchpin of the government's case was the testimony of two co-conspirators who admitted to being involved in the alleged conspiracy and identified the six defendants as co-conspirators. The government, anticipating that the testimony of the co-conspirators would be branded by defense counsel as "tainted and polluted", also introduced extensive corroborating evidence. This corroborating evidence included government exhibits 207A (a list of the townships in Lancaster County) and 207B (a list of the boroughs in Lancaster County) which were prepared by a co-conspirator, Mr. Faylor, who was deceased at the time of trial. The initials of a conspirator were hand-written next to each municipality on the lists. According to the government Mr. Faylor placed the initials of a conspirator next to a particular municipality

to identify who was to receive the bituminous paving business of that municipality.[2]

In further corroboration of its case, the government introduced color-coded charts to illustrate for each year in question the allocation of municipal business among the conspirators. The evidence established that the color-coded charts correctly reflected bidding records of each municipality in Lancaster County. These color-coded charts buttressed the government's case because they illustrated a consistency between the testimony of the immunized co-conspirators and the allocations set forth on exhibits 207A and 207B. The bid records during the conspiratorial period for bids made by the co-conspirators to DGS also generally corroborated the testimony of the two immunized witnesses.

Finally, the government presented exhibits 220 through 228 inclusive, which compared the prices bid for similar bituminous material to municipalities and DGS in the counties surrounding Lancaster County with prices bid within Lancaster County. These exhibits demonstrated that bid prices in the surrounding counties for the same materials were substantially lower than bid prices within Lancaster County.

Both individual defendants testified in their own behalf and in behalf of their corporate principals. Both Mr. Schell and Mr. Sweigart denied involvement in any conspiratorial conduct and maintained that it was their position throughout the alleged conspiratorial period that they "agreed to disagree". The defendants also introduced expert economic testimony refuting the contention of the government that government exhibits 220 through 228, inclusive, corroborated the existence of a conspiracy within Lancaster County.

---

2. The government's evidence established that other co-conspirators would submit complimentary bids over the bid price of the conspirator designated as the firm to receive the business of a particular municipality. The purported purpose of the complimentary bids was to create an appearance of legitimate bidding.

After considerable deliberation, the jury returned a guilty verdict against each defendant. The defendants raise a number of contentions in support of their post trial motions. Jeffrey G. Sweigart, McMinn's Asphalt, Inc., and McMinn's Asphalt Products, Inc., are represented by the same attorney and have incorporated in their post trial motions every contention made by Ger-Shep, Inc., formerly Lancaster Valite, Inc.; KLP, Inc., formerly Bituminous Applicators, Inc.; and Theodore W. Schell. The latter three defendants are also represented by one attorney. However, the latter defendants have not joined in all of the contentions set forth by the attorney for the former defendants.

I reject each contention made by the defendants in support of their post trial motions for the reasons set forth below and therefore will deny the defendants' motions.

II. THE GOVERNMENT ESTABLISHED A SUFFICIENT INTERSTATE COMMERCE PREDICATE

The McMinn defendants, but not the Schell defendants, maintain that the government's evidence was insufficient, as a matter of law, to establish that the activities of the defendants and their co-conspirators were in the flow of or substantially affected interstate commerce. Initially I note that the McMinn defendants made no objection to the jury instructions on this issue. The jury was instructed in accordance with concepts set forth in *United States v. Fischbach and Moore, Inc.*, 750 F.2d 1183 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 1397 (1986). There, Chief Judge Aldisert stated:

> An "in commerce" theory requires that the government prove that (1) a substantial volume of interstate commerce is involved with the challenged activity and (2) the challenged activity is an essential, integral part of the transaction and is inseparable from its interstate aspects . . . . An "effect on

> commerce" theory, applies to primarily intrastate activity. The government must show that (1) a substantial amount of interstate commerce was involved and (2) the challenged activity has a "not insubstantial effect" on interstate commerce.

Id. at 1192 (citations omitted). The McMinn defendants urge that the government's evidence is insufficient to meet either test.

This contention fails since the interstate commerce predicate is adequately established by proof that any of the conspirators substantially affected interstate commerce by the conspiracy to fix prices or rig bids. *See United States v. Young Brothers, Inc.*, 728 F.2d 682, 689, n.7, (5th Cir.), *cert. denied*, 105 S.Ct. 246 (1984); *United States v. Foley*, 598 F.2d 1323, 1328 (4th Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980); *United States v. Wilshire Oil Co.*, 427 F.2d 969, 974 (10th, Cir.), *cert. denied*, 400 U.S. 829 (1970). A similar position is set forth in the American Bar Association, section of antitrust law, *Sample Jury Instructions in Criminal Antitrust Cases*, 89 (1984).

The evidence of the government established that a number of the co-conspirators and defendants purchased substantial quantities of asphaltic cement (a component used in the preparation of bituminous paving materials) from refineries in Baltimore, Maryland. The government's evidence included out of state purchases of asphaltic cement by McMinn's Asphalt Co., Inc., and McMinn's Asphalt Products, Inc., during the conspiratorial period. For example, McMinn's Asphalt Products, Inc., purchased as much as $799,000.00 worth of asphaltic cement from Blake Asphalt at refineries in Baltimore in 1982. McMinn Asphalt Co., Inc., also purchased smaller, although substantial, quantities of asphaltic cement from refineries in Baltimore.

The McMinn defendants contend, however, that the government failed to prove that the asphaltic cement

purchased from the Baltimore refineries was included in the bituminous materials sold to the Lancaster County municipalities or DGS. In my view, the jury was entitled to infer that some of the substantial purchases of asphaltic cement made by the conspirators were included in the bituminous paving material subject to the alleged bid rigging and price fixing. The jury was properly told that they were not limited to the direct evidence in the case. They were informed that in their discretion they may make reasonable inferences from the direct evidence which are warranted by the circumstances. In light of the magnitude of the interstate purchases of asphaltic cement by the conspirators, it is clear that it would be improper to take from the jury the issue of whether or not the government established an interstate commerce predicate.

The government's evidence on the interstate commerce issue was not limited to the purchase by the conspirators of asphaltic cement from Baltimore refineries. The government also showed that the defendants and their co-conspirators obtained bid bonds and performance bonds from corporate sureties whose principal office or state of incorporation was outside of Pennsylvania.[3] Thus, the record made by the government on this issue and the case law discussing the interstate commerce predicate support my decision to present the interstate commerce issue to the jury and prevent me from disturbing the jury's decision on that issue.

---

3. Pennsylvania statutes require bid bonds in regard to bids over a specified dollar amount to municipalities and DGS. *See* Pa. Stat. Ann. tit. 8 §193 (Purdon Supp. 1986).

III. THE DEFENDANTS WERE PROPERLY CONVICTED OF A SINGLE CONTINUING CONSPIRACY

Both the Schell defendants and the McMinn defendants maintain that the government's case is fatally flawed by variances between the indictment and the evidence. Specifically, they claim that the government failed to prove a single continuing conspiracy as charged in the indictment and, therefore, failed to prove the indicted offense and prejudiced the defendants by introducing evidence of separate conspiracies beyond the five year statute of limitations applicable to this prosecution. *See* 18 U.S.C. §3282 (1983).

The defendants suggest that the testimony of the immunized co-conspirators precluded the government from proceeding on a continuing conspiracy theory. During cross examination these witnesses acknowledged that the agreements to fix prices, rig bids, and allocate territories were done annually prior to the bidding period and that nothing was said or done by the co-conspirators at a particular meeting to schedule meetings in subsequent years. Accordingly, the defendants urge that the government's proof showed separate conspiracies.

Although defendants are correct that the immunized witnesses did acknowledge on cross examination that the conspiratorial arrangements did not include a precise understanding that the arrangement would continue from year to year, the actions of the conspirators could well lead a jury to decide that there was an ongoing continuing conspiracy. Again, the defendants do not object to the instructions to the jury on the continuing conspiracy issue.[4] Rather, they claim that as a matter of law the evidence fails to establish the

---

4. The jury instructions on this issue were based upon United States v. Smith, 789 F.2d 196 (3d Cir. 1986).

continuing conspiracy alleged in the indictment and relied upon by the government at trial.

Substantial direct and circumstantial evidence, however, supports the government's theory of continuing conspiracy. There was evidence that the co-conspirators met prior to the bidding period for the years, 1979, 1980, 1981, and 1982 at the home of Charles McMinn, a co-conspirator. Each meeting was attended by representatives of the principal bituminous paving suppliers in Lancaster County. The government's evidence also showed that Mr. Nock, who purchased a bituminous paving plant from a co-conspirator, commenced attendance shortly after the purchase.

At each meeting the co-conspirators discussed the prices of their products and allocation of territories. At each meeting they circulated lists similar to government exhibits 207A and 207B. Further, there was a pattern of allocation that continued from year to year as illustrated by the color-coded charts. Most damaging to the defendants' separate conspiracy contention is Mr. Nock's testimony that Mr. Schell informed him that the bituminous paving business of certain townships went with the plant he purchased.

I hold that even though the immunized witnesses testified that there was no conversation at any conspiratorial meeting pertaining to scheduling meetings in ensuing years, it is clear that the jury was warranted in finding a continuing conspiracy because of the continuing conduct of the conspirators. The evidence in this case did not show criminal conduct of the type that is once and done. In this case, the conspiracy made sense only if it continued from year to year.

The record established that the capital cost of bituminous paving plants was substantial and that the conspirators, at least circumstantially, had expectations that their agreement was ongoing. An immunized witness, Burkholder, testified that the conspirators were concerned about low prices and cutthroat competition.

The purpose of their meetings was to raise prices and eliminate cutthroat competition, and there is no evidence, either direct or inferential, that their motive was limited to a particular year. On the contrary, all of the evidence suggests that it was continuing. The conclusory remark of Mr. Burkholder that there was no arrangement at a particular yearly meeting to meet in a subsequent year is insufficient, in light of all the other evidence in the case, for me to take that issue from the jury.

IV. THE COURT DID NOT ERR IN ADMITTING GOVERNMENT EXHIBITS 207A AND 207B

Government exhibits 207A and 207B—the lists of townships and boroughs initialed by Mr. Faylor, the president of H.R. Miller, Inc., and an alleged co-conspirator—were properly admitted. Although Mr. Faylor was deceased at the time of trial, his secretary authenticated the list by identifying Mr. Faylor's handwriting and testifying that Mr. Faylor brought the list back from a meeting. She did not, however, know when the list was initialed, the purpose of the initials, or the manner in which Mr. Faylor used the list. The McMinn defendants objected to the admission of these exhibits and urge that the evidentiary ruling was reversible error. They maintain that the initials on the typewritten list are out-of-court assertions by Mr. Faylor and should be barred as inadmissible hearsay.

The McMinn defendants are incorrect in their contention. It is clear that the documents were properly authenticated. The testimony of Mr. Faylor's secretary combined with the testimony of Mr. Burkholder (*see* Tr. Vol. 4 pages 43-44 and 61-63) establish that the list is what it purports to be and is the document used by the co-conspirators and circulated at one of their meetings.[5]

---

5. In Link v. Mercedes-Benz of North America, Inc., 788 F.2d 918, 927 (3d Cir. 1986), the court noted that circumstantial

The consistency between the list and the bidding patterns of the co-conspirators further supports the authenticity of the document.

It is also clear that the document is not hearsay because Fed. R. of Evid. 801(d)(2)(E) defines a statement by a co-conspirator as not hearsay if it is made during the conspiracy and in furtherance of it. There is an additional requirement that before co-conspirators' statements are admissible, independent evidence of a particular defendant's participation in the conspiracy must be established by the government by a preponderance of the evidence. The trial judge makes this determination outside of the presence of the jury. In this case, I found, by a preponderance of the evidence, that there was sufficient independent evidence of each defendants' involvement in the conspiracy to permit the admission of co-conspirators' statements. *See United States v. Ammar*, 714 F.2d 238, 250 (3d Cir.), *cert. denied*, 464 U.S. 946 (1983).

In addition, even if the document is classified as hearsay through a rejection of the application of Rule 801(d)(2)(E), Rule 803(6), the business records exception, allows hearsay set forth in a data compilation of events made at or near the time by a person with knowledge, if kept in the course of a regularly conducted business activity. Here, the prerequisites of Rule 803(6) are met because there is evidence that Faylor consistently made use of these lists or similar lists and that he made the data compilation and used it in his business activities. *See In Re Japanese Electronic Products*, 723 F.2d 238, 288-89 (3d Cir. 1983) (holding that the regular practice requirement [of 803(6)] should be generously construed to favor admission). It should be noted that the person making the compilation need not testify

---

FOOTNOTE *(Continued)*

evidence is sufficient to authenticate a document and that the burden on the proponent is slight. Clearly, this standard has been satisfied in regard to Exhibits 207A and 207B.

if the custodian of the records supplies the necessary predicate. The testimony of the record keeper (Faylor's secretary) and the testimony of the immunized witnesses provide the foundation for the admission of these exhibits as business records.

V. THE COURT DID NOT COMMIT REVERSIBLE ERROR IN ADMITTING THE "OUT-OF-COUNTY" EVIDENCE

Both the McMinn defendants and the Schell defendants contend that government exhibits 220 through 228, inclusive, relating to price comparisons between Lancaster County and surrounding counties were improperly admitted. They also argue that it was reversible error to permit Mr. Carr, an official of an out-of-county competitor, to describe conversations he had with a co-conspirator about the entry of Carr's firm into the Lancaster County municipal market for bituminous paving materials.

Defendants urge that the court erred in balancing the relevant probative value of government exhibits 220 through 228, inclusive, against possible prejudice from use of those exhibits. The exhibits illustrated that bid prices for similar bituminous paving materials in the surrounding counties were lower than the defendants' bids in Lancaster County. In some cases the exhibits showed that the co-conspirators' prices were higher within Lancaster County than without the county. In support of their contentions, the defendants point to the opinion testimony of their economic experts that the evidence does not purport to establish what the government maintains.

The government argues, however, that its exhibits 220 through 228, inclusive, do in fact corroborate the testimony of the immunized witnesses as to the existence of the conspiracy. The government admits that these exhibits are by themselves insufficient to show the

existence of the alleged conspiracy but urges that it was proper to admit the evidence as corroboration. I hold that the government's position is correct. It is for the jury to assess the evidence. While it is true that factors (other than a price fixing conspiracy) might explain the pricing differentials illustrated by exhibits 220 through 228, inclusive, that possibility does not render the exhibits inadmissible. Certainly, the exhibits have a valid probative purpose for corroboration. It is at least arguable that, if there was a conspiracy limited to Lancaster County, one would expect that the prices in the surrounding counties would be lower. This is what these exhibits illustrated and therefore the exhibits are relevant, at least for corroborative purposes.

Moreover, the defendants have not established that the exhibits are in any way unfairly prejudicial. Of course, the exhibits corroborate the immunized witnesses and to this extent adversely affect the defendants' position in this litigation. That, however, is not tantamount to the exhibits being prejudicial. The exhibits were not inflammatory, nor did the prosecution present the exhibits in an unfair manner. In short, there was nothing to balance because the exhibits were relevant and there was no unfair prejudice flowing from the introduction of the exhibits. The defendants suggest that the jury may have been confused by the exhibits; however, the defendants point to no confusion other than the testimony of their experts that the exhibits by themselves do not establish conspiratorial conduct.

The defendants further contend that the confrontation requirement of the Constitution has somehow been violated by the introduction of these exhibits. The exhibits were compiled by a paralegal in the office of the prosecutor. She testified as to the manner of collecting the data and collating it in the exhibits. The supporting data which she summarized in the exhibits was made available to the defense. There is no confrontation problem. *See United States v. Colyer*, 571 F.2d 941 (5th

Cir.), *cert. denied*, 439 U.S. 933 (1978) (admission of credit card tickets did not deprive defendant of right to confront witnesses from the businesses where the tickets made).

The defendants argue that they had insufficient time to prepare a refutation for the exhibit. At first, the case was continued because of the death of the father of one of the attorneys involved for the Schell defendants. His associate, who was extensively involved in the pretrial proceedings and attended the jury trial, had an adequate amount of time to review these exhibits. Furthermore, the pricing information set forth in the exhibits included data which was available to the defendants. Also, Mr. Schell and Mr. Sweigart had access to information about the cost factors involving bituminous paving material.

Thus, the defendants were not prejudiced by an inability to refute the exhibits. To the extent they thought the exhibits did not corroborate the immunized witnesses, they had ample time to review the data with their clients and with their experts. Finally, I repeatedly offered the defendants a hiatus in the trial in order for them to pursue whatever avenues of investigation they found appropriate in regard to these exhibits. *See* Tr. Vol. 1 at 176-183, Tr. Vol. 9 at 159-161. These offers were not accepted.

Both of these defendants also urge that it was reversible error to admit the testimony of James Carr. Mr. Carr is an official with General Crushed Stone Company, a bituminous paving producer in Berks County. The defendants claim that the Carr testimony involves criminal wrongdoing not alleged in the indictment and that therefore there is a fatal variance between the proof and the indictment. In addition, the Schell defendants claim that the conversations Mr. Carr had with co-conspirators were inadmissible because they took place after the sale of Schell assets to the McMinn Corporations.

I reject all of these contentions. Carr testified that pressure was placed upon him at these meetings by Burkholder, McMinn and Sweigart in regard to his attempts to compete for municipal business in Lancaster County and that he was told "we don't need low prices." It is not at variance with the indictment to admit this evidence because for a price fixing and bid rigging conspiracy to be effective within Lancaster County, it is important that competitors, not within the conspiracy, be discouraged from competing within the county. The attempt by the conspirators to obtain cooperation from Carr is probative of the existence of the conspiracy as testified to by the immunized witnesses and does not introduce acts of wrongdoing not charged within the indictment. The meeting with Carr took place within Lancaster County and related to Lancaster County business.

In regard to Mr. Schell's contention that he was not involved in the Carr conversations, it must be noted that one conspirator is responsible for the actions of the other co-conspirators even if he does not engage in them personally and even if he had no knowledge that the other conspirators were doing what they did. *Blumenthal v. United States*, 332 U.S. 539, 557 (1947). The acts of the co-conspirators in meeting with Carr were in furtherance of the alleged conspiracy and occurred during the existence of the conspiracy as alleged in the indictment. Furthermore, there was testimony from the immunized witnesses about the co-conspirators discussing out-of-county competitors. Mr. Nock testified that Mr. Schell complained about that problem. Moreover, Mr. Schell does not take the position he had withdrawn from the conspiracy at the time of the Carr conversations. Schell's position is that he never was a conspirator.

VI. THE COURT DID NOT ACT IN A PREJUCICIAL MANNER TOWARD ANY DEFENDANT

The Schell defendants allege that I was prejudiced in favor of the government. First, they assert that I conveyed to the jury my opinion that the immunized witnesses were truthful. During the examination of Burkholder by the prosecution, counsel for the Schell defendants informed the court that he did not hear the witness's answer. The witness had answered "Obviously, yes." I replied to counsel "Obviously, yes, he was mistaken." (Tr. Vol. 5, p. 54) The defendants suggest that by adding the words "he was mistaken" I excluded the possibility that the witness fabricated a lie and thereby conveyed to the jury a feeling on my part that Burkholder was telling the truth. A more complete quotation from the record is necessary to understand what took place.

> Q. I have handed to Mr. Buckholder what's in evidence as government exhibit GE54-3A. Now Mr. Burkholder, these are the township minutes of Upper Leacock Township dated July 5, 1979. There is a bid report in here for ID2 for paving Musser School Road, School Drive and Hickory Lane. Is that correct?
>
> A. Yes.
>
> Q. Who are the bidders on that contract?
>
> A. Burkholder Paving, Lancaster Valite.
>
> Q. And who does the township records indicate won that bid that year?
>
> A. Burkholder Paving.
>
> Q. Would you be mistaken sir—
>
> Mr. Sprague: I object to that, Your Honor. For the Government to try to rehabilitate this witness in terms of what he just testified—

The Court: Overruled. The Federal Rules specifically imply you may impeach your own witness. Overruled.

Mr. Sprague: I submit there's got to be some plea here first; you just don't take a document and then go to correct him like that.

The Court: Overruled. He may impeach his own witness.

Q. Mr. Burkholder, does that refresh your recollection that the conversation you had with Mr. Schell about Upper Leacock in 1979 was not in respect to you giving him a complementary [sic] bid?

A. Obviously, yes.

Q. Do you recall—

Mr. Sprague: I did not hear that answer, Your Honor.

The Court: Obviously, yes, he was mistaken. (Vol. 5, pp. 53-54)

Reading the record in context, it is clear that my use of the word "mistaken" was taken from the question of the prosecutor. It was not an assessment of the court as to the credibility of the witness and it did not convey that type of impression to the jury. Furthermore, when counsel for the defendant raised this problem with the court at the close of proceedings on that day, arrangements were made to give a curative instruction to the jury on that point.[6]

---

6. As a curative instruction I told the jury, *inter alia*, "[w]hether he was mistaken, his motives in doing what he did and all that kind of thing, are strictly for you, and I'm not trying to send any hints for you that I believe or disbelieve any particluar witness." Tr. Vol. 6 pp. 12-13.

On page 32 of the Schell defendants' brief, it suggested that I conveyed to the jury my finding that the immunized witnesses "were essentially trying to be truthful". I certainly made that finding; however, it was not in the presence of the jury. It was at a stage in the proceedings when I was required to make a finding outside of the presence of the jury as to whether or not there was independent evidence of the existence of a conspiracy to support the introduction of co-conspirators' statements pursuant to Fed. R. of Evid. 801(d)(2)(E). It is incumbent upon the court to make a finding, one way or the other, on this issue outside of the presence of the jury and my finding in regard to the immunized witness's credibility was never conveyed to the jury.

The defendants also take issue with my question to Mr. Burkholder, outside of the presence of the jury, concerning whether or not he discussed his testimony with anyone from the defense side of this case. Mr. Burkholder replied "no". I made this inquiry because it was relevant to a determination of whether or not I should permit the government to ask leading questions of the witness on redirect examination. I had perceived a change in the tenor of the witness's testimony. It was for that reason I permitted leading questions. I think my inquiry was appropriate under the circumstances and in no way prejudiced any defendant before the jury.

My charge to the jury, after covering the complex legal issues involved in this case, suggested that the jury focus its attention upon certain key disputes. One of the key disputes was the credibility of the immunized witnesses versus the credibility of the individual defendants who denied any conspiratorial conduct. I instructed the jury:

> "So while I read a lot of words to you on this point, the controversy is quite clear cut for you. Is the version of Nock and Burkholder correct? If it is,

> that would suggest a guilty verdict. If it's not, that would suggest a not guilty verdict." (Tr. Vol. 22, pp. 35 and 36).

The Schell defendants took specific exception to this instruction. I gave supplemental instructions in response to this specific exception wherein I stated:

> What I said was that the Nock and Burkholder version do suggest some points in favor of the government, but they also suggest some points in favor of the defendants, and you have to evaluate the entire testimony as well as the corroborative testimony. (Tr. Vol. 22, pp. 72 and 73).

In their post trial motions, the Schell defendants argue that the instruction and the supplemental instruction were defective because I did not inform the jury that they could find that the immunized witnesses were truthful and still find for the defendants. I reject this contention. The charge taken as a whole was adequate. The supplemental instruction was sufficient to clear up any misunderstanding and the Schell defendants, although given the opportunity, never advised me of their dissatisfaction with the supplemental instruction.

The defendants contend that it was error for the court to ask Burkholder to explain to the jury the mechanics of complimentary bids. This was not error. It was a discharge of my obligation to make sure that the jury understood the factual underpinnings of the controversy. *See United States v. Stirone*, 311 F.2d 277, 280-81 (3d Cir. 1962), *cert. denied*, 372 U.S. 935 (1963).

The other instances referred to by the Schell defendants in regard to the manner in which the court resolved objections and interjected questions border on the frivolous and will not be discussed further. The record refutes the contentions of the Schell defendants that the court acted as a back-up to the government in presenting evidence to the jury.

The Schell defendants object to a humorous remark the court directed to the prosecutor during his cross examination of Mr. Sweigart. Mr. Sweigart testified to his age on direct examination. During the cross examination the prosecutor in his questioning incorrectly referred to Mr. Sweigart's age as being more advanced than Sweigart had said. I asked the prosecuting cross-examiner "Are you suggesting that he's aging under your cross examination?" (Tr. Vol. 18, p. 153) No objection was made at that time. A few moments later, *sua sponte*, I made the following remarks to the jury:

> . . .[Members of the jury, and before I forget it, it's not good form for me to say something funny. And I just don't want you to get the wrong impression. The case is very serious to both sides. I think you know that from the effort that's forthcoming from both sides. And the penalties for violation of this type of offense are serious and severe. So it's really not a funny case and I probably shouldn't have made a funny remark, so just strike that from your memory. (Tr. Vol. 18, p. 157).

At the end of each trial day, I gave counsel an opportunity to place statements on the record and call to my attention any problems that needed to be resolved. At the end of the day counsel for the Schell defendants took exception to my humorous remark. This exception is meritless. The remark did not have any adverse impact on the Schell defendants. In fact, I gave the cautionary instruction to the jury because of my impression that the humorous remark was at the expense of the prosecuting cross-examiner. In any event, I emphasized to the jury the seriousness of the case and that it was inappropriate for me to inject humor in the proceedings. The Schell defendants were not prejudiced by this incident.

The other objections made by the Schell defendants pertaining to the manner in which the court conducted the trial do not deserve detailed responses. On occasion

I rephrased questions posed by both the prosecuting attorneys and the defense attorneys in order to resolve, in an expeditious way, objections raised by opposing counsel. In my view, this was necessary to keep a lengthy and tedious trial moving. There was a danger in this proceeding that the jury would lose its concentration because of the presentation of extensive details by the prosecution as well as the defense. It is better practice, in my view, to rule quickly on objections and where necessary rephrase questions for the attorneys in order to expedite the trial. Furthermore, the extent to which I rephrased questions for the attorneys was much more limited than suggested by the Schell defendants in their post trial brief. My general practice is to let the attorneys try their own cases with the court staying out of the fray as much as possible. The Schell defendants have selected isolated instances to support their argument. The record will refute their contention that the Court took the trial away from the attorneys and conducted it himself.

Finally, it was not error for me to tell an immunized witness, Mr. Nock, that he should be specific as possible in relating co-conspirator conversations but that, if he can't remember everything verbatim, he should give us his best recollection. This admonition was given to the witness in order to satisfy the concern of defense counsel that the immunized witnesses be as precise as possible when paraphrasing co-conspirator conversations. The instruction to the witness was not error; it did not take the trial away from the attorneys; and it was not prejudicial to any party.

An appropriate order will be entered.

BY THE COURT:

/s/ EDWARD N. CAHN
Edward N. Cahn, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	CRIMINAL NO.
v.	:	86-00010-02
	:	86-00010-03
GER-SHEP, INC., formerly	:	86-00010-05
LANCASTER VALITE, INC.;	:	86-00010-06
KLP, INC., formerly	:	86-00010-07
BITUMINOUS APPLICATORS,	:	86-00010-08
INC.;	:	
McMINN'S ASPHALT CO., INC.:	:	
McMINN'S ASPHALT PRODUCTS,	:	
INC.;	:	
THEODORE W. SCHELL; and	:	
JEFFREY G. SWEIGART,	:	
Defendants	:	

ORDER

AND NOW, this 10th day of December, 1986, IT IS ORDERED that all of the post trial motions of defendants are DENIED.

IT IS FURTHER ORDERED that the defendants are directed to report for sentencing on Wednesday, December 31, 1986, at 10:00 A.M. in Courtroom 2, Old Lehigh County Courthouse, 501 Hamilton Street, Allentown, Pennsylvania.

BY THE COURT:

/s/ EDWARD N. CAHN
Edward N. Cahn, J.

(3)

No. 87-1223

In the Supreme Court of the United States

OCTOBER TERM, 1987

GER-SHEP, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
CHARLES F. RULE
Assistant Attorney General
KENNETH G. STARLING
Deputy Assistant Attorney General
JOHN J. POWERS, III
MARION L. JETTON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

13 pp

QUESTIONS PRESENTED

1. Whether the trial court correctly instructed the jury on the interstate commerce element of an offense under Section 1 of the Sherman Act.

2. Whether the government introduced sufficient evidence that petitioners engaged in a conspiracy.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statute:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1223

GER-SHEP, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals' judgments affirming petitioners' convictions (Pet. App. A1-A15) are reported at 833 F.2d 308 (Table). The district court's opinion on petitioner's post-trial motions (Pet. Supp. App. SA1-SA21) is unreported.

JURISDICTION

The judgments of the court of appeals were entered on October 19, 1987. A petition for rehearing was denied on November 12, 1987 (Pet. App. A16-A17). The petition for a writ of certiorari was filed on January 11, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the Eastern District of Pennsylvania, petitioners were convicted of conspiring to allocate territories, fix prices, and submit rigged bids, in violation of Section 1 of the Sherman Act (15 U.S.C. 1). The conspiracy concerned municipal and state contracts for the purchase and application of hot-mix asphalt in Lancaster County, Pennsylvania.

Two of petitioners' co-conspirators, Eugene Burkholder and Thomas Nock, testified for the government. They described the meetings at which the illegal agreements were reached and how those agreements were implemented. Their testimony was supported by documents, including bid and telephone records and the notes of one conspirator that showed the allocated territories. A competing hot-mix producer also testified about the conspirators' attempts to obtain his cooperation.

Burkholder testified that, in 1977 and 1978, extremely competitive conditions prevailed in Lancaster County; producers hauled long distances for relatively low prices (C.A. App. 571a, 582a, 973a-977a). Because Burkholder was concerned about the profitability of his paving company, he arranged a meeting of his Lancaster County competitors in late 1978, just prior to the 1979 season for bidding on government contracts (*id.* at 564a, 568a, 572a-576a). Burkholder, petitioners Sweigart and Schell, and Sweigart's superior Charles McMinn attended this meeting (*id.* at 577a).[1]

---

[1] Petitioner Schell owned petitioners Ger-Shep, Inc. and KLP, Inc. McMinn, the owner of petitioners McMinn's Asphalt Co., Inc. and McMinn's Asphalt Products, Inc., died prior to the indictment in this case. Petitioner Sweigart did bidding for McMinn's companies and succeeded him as president. C.A. App. 617a, 2516a-2517a, 2523a-2525a.

At the meeting, Burkholder proposed that the competing hot-mix producers quit bidding on distant jobs. He proposed that they "bid basically in the municipalities surrounding our plants" (C.A. App. 582a-583a). The others at the meeting agreed to this proposal and the participants allocated Lancaster County municipalities based on this principle (*id.* at 583a-584a, 587a-597a).[2] The participants also agreed to "attempt to increase the price" (*id.* at 581a) by setting "parameters" for their posted prices; the posted prices, in turn, formed the basis of their bids to the state and municipalities (*id.* at 584a-587a, 603a-607a, 985a-986a).

At a second meeting, held in December 1979 prior to the 1980 bid season, the same individuals used a typewritten list again to allocate Lancaster County municipalities. Burkholder testified that, during the discussion, everyone at the meeting took notes on his copy of the list (C.A. App. 607a-616a). The group also discussed the levels that posted prices "should be," and again agreed on pricing "parameters" (*id.* at 616a-617a).

The conspirators held a third meeting in February 1981, prior to the 1981 bid season. Burkholder and Nock, whose company had purchased Imperial Blacktop from Schell in the period between the second and third meetings, testified that this meeting covered the same two topics—allocating territories and fixing price ranges. Petitioners discussed and agreed on adjusting posted prices upward, and agreed on "who would get certain municipalities" (C.A. App. 619a-626a, 639a, 1900a-1907a, 2033a-2036a, 2069a-2070a,

---

[2] At trial, Burkholder listed the territorial allocations that he could recall. The evidence showed that in 1979 the assigned conspirator (or an outsider to the conspiracy) bid and won in almost every case in accordance with the allocations Burkholder described. C.A. App. 591a-597a; GX 79.

2077a-2084a).[3] The participants again used typewritten lists to allocate territories.[4] Nock's firm was assigned the municipalities previously allocated to Imperial Blacktop (*id.* at 623a-625(1)a, 1905a-1907a, 2032a-2036a).

Petitioners Schell and Sweigart attended a final meeting in December 1981 to discuss the 1982 bid season. Once again, the participants agreed on ranges of posted prices and generally reaffirmed the allocated territories by using a typed list. McMinn's company was given the territory of one of Schell's companies that it had acquired (C.A. App. 670a-679a, 686a-690a, 1923a-1925a).[5]

The government corroborated the testimony of Burkholder and Nock in several ways. James Carr, an out-of-

---

[3] Nock testified that when his company was negotiating for the purchase of Imperial Blacktop, he expressed concern that Schell's asking price was too high for the projected earnings. Petitioner Schell reassured Nock that there were three or four townships that Nock would "automatically get that went with the plant" (C.A. App. 1885a-1888a, 2050a). Nock understood this to mean that his bids would be uncontested by competitors in the area (*id.* at 1889a).

[4] The testimony about the use of a typewritten list to assign territories was corroborated by documentary evidence. A list of municipalities (GXs 207A, 207B) brought back by one conspirator from the meeting in 1981 had initials corresponding to members of the conspiracy placed next to the various municipalities (C.A. App. 1139a-1143a, 1154a-1156a). Burkholder confirmed that this was the type of list used at the meetings to divide territories (*id.* at 693a-695a). Moreover, bidding records for Lancaster County municipalities showed a very close relationship in 1981 between the handwritten notations on the list and the successful bidders (GX 81; C.A. App. 1269a-1292a).

[5] In addition to their testimony about territorial allocations and agreements on posted prices, Burkholder and Nock discussed the conspirators' frequent use of complementary bids (C.A. App. 618a-620a, 725a-763a, 794a-814a, 994a-995a, 1949a-1953a, 2075a-2076a). Such bids are intentionally high to create the impression of competition when there is none (*id.* at 619a).

county competitor, testified that Burkholder, McMinn, and Sweigart had told him that they were displeased about his low bids in Lancaster County and had asked him to "call" about future bids (C.A. App. 1435a-1441a, 1470a-1472a; see also *id.* at 704a-718a). The government also introduced evidence that, during the conspiracy, prices were about 10 to 20% higher in Lancaster County than in five surrounding counties of the same rural character (*id.* at 2120a-2124a; GXs 220-228).

The court of appeals affirmed petitioners' convictions by unpublished orders (Pet. App. A1-A15). The court held, inter alia, that the evidence was sufficient to support petitioners' convictions.

ARGUMENT

Petitioners claim (Pet. 8-13) that the trial court's supplemental jury instruction on the interstate commerce element of a Sherman Act violation was erroneous. They also claim (Pet. 13-16) that there was insufficient evidence to support their convictions. Neither of those contentions is correct. Accordingly, this fact-specific case does not warrant review by this Court.

1. Petitioners acknowledge (Pet. 12) that the trial court's general instruction to the jury on the interstate commerce element of a Sherman Act violation was correct. They assert, however, that the trial court's instruction given in response to a jury question incorrectly relieved the government of proving the jurisdictional interstate commerce element. Petitioners also argue that, in a case alleging a per se antitrust violation, the jurisdictional element cannot be met by proof of an effect on interstate commerce; the proof must show a transaction actually in interstate commerce.

Petitioners did not raise these two related contentions in their main brief in the court of appeals. Petitioners Schell, Ger-Shep, Inc., and KLP, Inc. raised them for the first time in their reply brief.[6] At oral argument in the court of appeals, the government noted that issues cannot be raised for the first time in a reply brief. See 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3974, at 428 & n.24 (1977). And the court of appeals did not refer to these contentions when it summarily affirmed petitioners' convictions. Hence, this Court should adhere to its general policy of not deciding "questions not raised or resolved in the lower court." *Youakim* v. *Miller,* 425 U.S. 231, 234 (1976).

In any event, petitioners' objections to the trial court's supplemental jury instruction are plainly wrong. In the supplemental instruction, the trial court carefully distinguished between the interstate commerce element and the question of unreasonable restraints of trade. The court informed the jury (C.A. App. 3249a):

> Now, you don't have to worry about unreasonable, because the charge here, by definition, is unreasonable, price-fixing, et cetera. But you do have to worry about interstate commerce.

The court then told the jury that it must decide the interstate commerce issue before it considered whether a conspiracy existed (*id.* at 3250a).[7] The court reminded the jurors that the government could prove the interstate

---

[6] The remaining petitioners plainly waived this claim by not objecting to the challenged instruction at trial (Pet. Supp. App. SA4; C.A. App. 3264a).

[7] The court told the jury that "[i]f the government does not prove the interstate commerce connection, * * * your verdict should be not guilty as to all defendants" (C.A. App. 3248a).

commerce element under either of two theories—that the challenged activity involved a substantial amount of interstate commerce or that it substantially affected interstate commerce (*id.* at 3249a-3253a). The court then summarized the parties' factual contentions concerning those two theories (*id.* at 3253a-3259a).[8] Finally, the court read from the Third Circuit's decision in *United States* v. *Fischbach & Moore, Inc.*, 750 F.2d 1183 (1984), cert. denied, 470 U.S. 1085 (1985), so that the jury would "have the exact law on the subject" (C.A. App. 3263a-3264a). This quotation set forth the government's standard of proof under the two tests (Pet. App. A20).[9] The court concluded by reminding the jury that, if it found that petitioners engaged in price-fixing and bid-rigging as charged, such conduct is presumed to be an unreasonable restraint on trade so that "the government is not required to prove any *adverse* impact on interstate commerce" (C.A. App. 3263a-3264a (emphasis added)).

The trial court thus clearly instructed the jury that the government was required to prove that the challenged activity involved a substantial amount of interstate commerce or that it had a substantial effect on interstate commerce. The government was not relieved of its burden on this element. The trial court made clear that the question of an

---

[8] There was ample evidence to support the government's case under either theory. The government showed that the conspirators spent millions of dollars to buy AC-20, a key ingredient in hot-mix, from out-of-state sources during the course of the conspiracy (C.A. App. 719a-725a, 1012a-1031a, 1041a-1061a, 1072a-1073a, 1147a-1148a, 1178a-1179a). In addition, the companies obtained necessary bonds from out-of-state companies (*id.* at 1181a-1190a).

[9] The court stated that the government must prove, inter alia, that the challenged activity involved a "substantial volume of interstate commerce" or had a "substantial effect on interstate commerce" (Pet. App. A20).

unreasonable restraint on trade (*i.e.*, adverse impact) was a separate matter. Because the conduct charged in the indictment was per se illegal, the court properly instructed the jury that the government need not prove that the substantial effect on interstate commerce was "adverse." There was plainly nothing inconsistent about the trial court's requiring the government to show a substantial effect on interstate commerce, but relieving the government of an obligation to show an actual adverse impact on competition. See *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 785 (1975).

Petitioners contend (Pet. 8-10) that the government should not be permitted to use a "substantially affecting" theory to establish the interstate commerce element in a case alleging a per se violation of the Sherman Act. There is no support for this argument. None of the decisions cited by petitioners for their contention (Pet. 9-10) suggests that a "substantially affecting" theory cannot be applied in a per se case. Indeed, in *Goldfarb* v. *Virginia State Bar*, a case involving per se illegal price-fixing (421 U.S. at 778, 781-783), this Court applied an "affecting commerce" test in holding that the evidence satisfied the jurisdictional interstate commerce requirement (*id.* at 785). See also *United States* v. *Azzarelli Const. Co.*, 612 F.2d 292, 294-295 (7th Cir. 1979), cert. denied, 447 U.S. 920 (1980) (rejecting claim that per se violation can occur only in "flow" of commerce situation, not in an "affecting commerce" case). Accordingly, the trial court properly instructed the jury on the interstate commerce element of a Section 1 violation.

2. Petitioners next argue (Pet. 4, 13-16) that the government's evidence was consistent with lawful conduct and that the government's case would not have survived summary judgment in a civil action. Petitioners' argu-

ment, at bottom, is a challenge to the sufficiency of the evidence. As the trial court correctly noted (2/20/87 Hearing 64), however, there was "[o]verwhelming * * * evidence of guilt" in this case.

Unlike *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984), on which petitioners rely (Pet. 14), this case does not involve ambiguous circumstantial evidence. As related above, the government proved the existence of the conspiracy through the testimony of two witnesses who were involved in the conspiracy. This testimony was supported by bid records, telephone records, a document setting forth the territorial allocations, and the testimony of a competitor who had been urged not to bid successfully in Lancaster County. Thus the lower courts correctly held that the evidence was sufficient to support petitioners' convictions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
CHARLES F. RULE
Assistant Attorney General
KENNETH G. STARLING
Deputy Assistant Attorney General
JOHN J. POWERS, III
MARION L. JETTON
Attorneys

FEBRUARY 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60314